UNITED STATES DISTRICT COURT DISTRICT OF MAINE

| CAROLE BERGERON, |) |
|------------------------------|------------------------|
| Plaintiff |)) |
| v. |) Docket No. 03-23-P-C |
| BRUNSWICK SCHOOL DEPARTMENT, |)) |
| Defendant |)) |

RECOMMENDED DECISION ON DEFENDANT'S MOTION TO DISMISS

The defendant, the Brunswick School Department, moves to dismiss as untimely this *pro se* action brought under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.*, and removed to this court by the defendant from the Maine Superior Court (Cumberland County). I recommend that the court grant the motion.

This action was filed in the state court on January 9, 2003. Docket Sheet, *Carole Bergeron v. Brunswick School Department*, Maine Superior Court (Cumberland County), Docket No. AP03-03 (Docket No. 2a). The plaintiff appeals from the decision of a hearing officer appointed by the Maine Department of Education on her claim that her daughter was entitled to special education services from the defendant. Complaint (Docket No. 2e) and State of Maine Special Education Due Process Hearing [Decision] ("Hearing Officer Decision") (Docket No. 2f) at 1. The IDEA provides that any party aggrieved by the findings and decision made after an impartial due process hearing conducted by a state educational agency, like the hearing held in this case, "shall have the right to bring a civil

action . . ., which action may be brought in any State court of competent jurisdiction or in a district court of the United States." 20 U.S.C. § 1415(i)(2)(A).

The IDEA, like many federal statutes, does not set a time limit for lawsuits brought under its terms. In such situations we do not ordinarily assume that Congress intended that there be no time limit on actions at all; rather, our task is to "borrow" the most suitable statute or other rule of timeliness from some other source. We have generally concluded that Congress intended that the courts apply the most closely analogous statute of limitations under state law, provided that it is not inconsistent with federal law or policy to do so.

Amann v. Town of Stow, 991 F.2d 929, 931 (1st Cir. 1993) (citations and internal punctuation omitted). The First Circuit has approved the borrowing of the limitations period established under a state's administrative procedure act as appropriate for IDEA actions. *Id.* at 931-32. In this case, the defendant contends that the applicable period is 30 days from receipt of the hearing officer's decision, citing section 13.14(C) of the Maine Department of Education's Special Education Regulations. Motion to Dismiss Complaint, etc. (Docket No. 3) at [2].

Maine's Administrative Procedure Act provides that a petition for review of final agency action must be filed in court within 30 days after receipt of notice by a party to the proceeding of which review is sought. 5 M.R.S.A. § 11002(3). Under governing First Circuit precedent, this is the limitation period that must be applied to the plaintiff's claim in this case. *See generally Providence Sch. Dep't v. Ana C.*, 108 F.3d 1, 3-5 (1st Cir. 1997). The hearing officer's decision is dated December 2, 2002. Hearing Officer Decision at 1. The defendant's motion relies, Motion at 2, on the following statement in the complaint: "I also ask that you understand that this may be a day late but I am not sure." Complaint at [1]. Standing alone, that statement is not sufficient to allow a court to find that the complaint was in fact untimely.

In her opposition to the motion the plaintiff states "I, personally, did not get a copy of [the hearing officer's] decision until December 18, 2002." Objection to Motion to Dismiss Complaint, etc.

("Objection") (Docket No. 4) at [2]. That date is clearly fewer than 30 days before January 9, 2003, when the complaint was filed. However, the plaintiff has also provided an affidavit in support of her objection which authenticates certain appended documents, including a letter dated December 16, 2002 from Pauline Lamontagne, Due Process Coordinator of the Maine Department of Education, to the plaintiff. Affidavit of Carole Bergeron (submitted with Objection) ¶ 4 & Letter dated December 16, 2002 from Pauline Lamontagne to Carole Bergeron ("Lamontagne Letter"). In that letter, Lamontagne states: "It is my understanding that Roxanne Doyer signed for [the hearing officer's] decision on December 9, 2002." Lamontagne Letter at 1. The letter goes on to inform the plaintiff: "Your sole recourse . . . is to appeal within 30 days of your (representative's) receipt of this decision." *Id.* Roxanne Doyer served as the plaintiff's representative at the due process hearing, Hearing Officer Decision at 1, and a copy of the decision was sent to her by the hearing officer with a cover letter dated December 6, 2002. Memorandum to Roxanne Doyer and Donald A. Kopp, Esq., dated December 6, 2002, Agency Index Case #02.302 "Bergeron v. Brunswick" ("Administrative Record") at 18.

The defendant contends that receipt of the decision by the plaintiff's advocate was sufficient to start the limitations period running, that the appeal was filed more than 30 days after that date² and that

¹ In a document entitled "Reply Memorandum in Support of Objection of [sic] Motion to Dismiss" (Docket No. 6), which the plaintiff did not seek leave to file, the plaintiff admits that Doyer signed for the decision at her "local postmaster" on December 9, 2002 and called the plaintiff the next day to discuss the ruling. *Id.* at [1]. Ordinarily, this court will not consider a filing in the nature of a surreply for which leave to file has not been sought. In this case, because the plaintiff appears *pro* se, I conclude that this relevant information should be considered. The plaintiff cites in her surreply *Seider v. Board of Exam'rs of Psychologists*, 710 A.2d 890 (Me. 1998), but that case is readily distinguishable from the facts presented here. The Law Court in *Seider* held that the period in which the plaintiff in that case could petition the state courts for review of a decision of the defendant had not expired because the copy of the defendant's order sent to the plaintiff and her attorney did not include written notice of her appellate rights as required by statute. No similar circumstance appears in the present case.

² The defendant incorrectly asserts that the plaintiff "concedes that her advocate, Roxanne Doyer, received a copy of the decision on December 6, 2002." Reply at 1. The only evidence in the record concerning Doyer's receipt of the decision is that this event occurred on December 9, 2002.

dismissal is therefore in order. Reply Memorandum in Support of Motion to Dismiss ("Reply") (Docket No. 5) at [1]-[3].

Notification of the representative who appeared on behalf of a party in an administrative proceeding is sufficient to initiate a period of limitations for further action unless the statute or regulation at issue specifically requires that the party him- or herself receive the notice. *See, e.g., Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 92-93 (1990) (federal Civil Rights Act). No sound policy reason is suggested by the circumstances of this case to require personal notification of a party to an IDEA due process hearing when that party's chosen representative has received notice, and neither the Maine Administrative Procedure Act nor the Maine Department of Education regulation requires such personal notification. The plaintiff has provided no evidence that would allow for equitable tolling of the limitations period in this case. *See, e.g., Carter v. Rubin*, 14 F.Supp.2d 22, 31 (D. D.C. 1998) (equitable tolling may be appropriate where defendant has actively misled plaintiff or plaintiff has in some extraordinary way been prevented from asserting her rights); *Dasha v. Maine Med. Ctr.*, 665 A.2d 993, 995 (Me. 1995) (discussing elements of equitable tolling under Maine law).

This action was in fact filed one day after expiration of the applicable limitations period, of which the plaintiff was specifically and personally informed sufficiently in advance to allow her to file in a timely manner. *See generally Amann*, 991 F.2d at 933. I accordingly recommend that the motion to dismiss be **GRANTED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which <u>de novo</u> review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to <u>de novo</u> review by the district court and to appeal the district court's order.

| Dated this 24th day of March, 2003. | | |
|-------------------------------------|---|--|
| | David M. Cohen United States Magistrate Judge | |
| Plaintiff | | |
| CAROLE BERGERON | represented by | CAROLE BERGERON 8 C Pejepscot Terrace Brunswick, ME 04011 PRO SE |
| V. | | |
| Defendant | | |
| BRUNSWICK SCHOOL DEPT | represented by | MELISSA A. HEWEY DRUMMOND, WOODSUM & MACMAHON 245 COMMERCIAL ST. P.O. BOX 9781 PORTLAND, ME 04101 |

207-772-1941